CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROGER KESTERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI MAY 8, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROGER KESTERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Tenth Circuit	A	1
Caption [omitted in printing]	A	1
Record from D. C. U. S., Northern Oklahoma	1	1
Caption [omitted in printing]	1	1
Indictment	1	1
Demurrer to indictment	2	2
Opinion, Kennamer, J	2	2
Order overruling demurrer	5	4
Judgment and sentence	6	5
Notice of appeal	7	5
Grounds for appeal	8	7
Recital as to supersedeas bonds	8	7
Order and direction to clerk for record on appeal	9	7
Clerk's docket entries	10	8
Clerk's certificate [omitted in printing]	11	8
Order of submission	12	9
Opinion, Lewis, J	13	9
Judgment	21	14
Clerk's note re mandate	21	14
Clerk's certificate [omitted in printing]	22	14
Order allowing certiorari	23	14

A Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the April Term, 1935, of said Court, before The Honorable Robert E. Lewis, The Honorable George T. McDermott, and The Honorable Sam G. Bratton, Circuit Judges.

[Captions omitted.]

1 In United States District Court for the Northern District of Oklahoma

No. 7887. Criminal

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROGER KESTERSON AND BERNORD ROBERTS, DEFENDANTS

Indictment

Violation Section 206, Title 26, United States Code Annotated.
Filed Oct. 5, 1934

United States of America, Northern District of Oklahoma, ss.
No. 7887

In the District Court of the United States at and within the Northern District of Oklahoma, at the Special March, A. D. 1934 Term Thereof, Sitting at Tulsa, Oklahoma.

The Grand Jurors of the United States of America, duly empaneled, sworn and charged in the District Court of the United States within and for the Northern District of Oklahoma, to inquire into and due presentment make of all offenses against the laws of the United States of America, committed and triable within said district, do, upon their oaths find, present, and charge that Roger Kesterson and Bernord Roberts, whose more true, full, and correct names are to the Grand jurors unknown, in Tulsa County, State of Oklahoma, Northern District of Oklahoma and within the jurisdiction of this court, did, on or about the 17th day of August, A. D. 1934, willfully, wrongfully, unlawfully, and feloniously engage in and carry on the business of a retail dealer in intoxicating liquors, contrary to the laws of the State of Oklahoma by then and there have and possessing for retail sales certain intoxicating liquor, to-wit: Fifty-four Pints of Whiskey, at a place, to-wit: at
2 1115 South Main Street in the city of Tulsa, Tulsa County, State of Oklahoma, Northern District of Oklahoma and within the jurisdiction of this court, without having paid the special excise tax of $1,000 therefor, as required by the provisions of section 206, title 26, U. S. C. A., and contrary to the form of the

statute in such case made and provided and against the peace and dignity of the United States of America.

JOE W. HOWARD,
Assistant United States Attorney.

A True Bill.

E. J. Bowers, Foreman of the Grand Jury.

[File endorsement omitted.]

Witnesses: J. J. Steagald, Tulsa. L. D. Kern, Tulsa. D. W. Woodhouse, Tulsa.

In United States District Court

Demurrer to indictment

Filed Nov. 9, 1934

The defendants demur to the indictment on file herein upon the following grounds:

That said Indictment, upon its face, shows an alleged violation of the provisions of Section 206, Title 26, United States Code Annotated, which section is unconstitutional for the reason that same is in direct violation of Article 1, Section 8, Clause 1, of the Constitution of the United States of America.

That said section is further unconstitutional for the reason that the excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate.

HICKMAN & UNGERMAN,
Attorneys for defendants.

[File endorsement omitted.]

In United States District Court

Opinion

Filed Nov. 9, 1934

Roger Kesterson and Bernard Roberts, defendants, stand charged by indictment for carrying on the business of retail liquor dealers, in violation of Section 206, Title 26, U. S. C. A. Defendants filed demurrer to indictment attacking the constitutionality of the sections of the statute providing for the payment of an excise tax of $1,000.00. Demurrer overruled.

3 Mr. C. E. Bailey, U. S. District Attorney; Mr. Chester A. Brewer, Assistant U. S. District Attorney; Mr. Joe Howard, Assistant U. S. District Attorney; for the plaintiff.

Hickman & Ungerman, Attorneys for the defendants.

Franklin E. Kennamer, District Judge. An indictment was returned into this court, charging the defendants with possession of

whiskey for sale as retail liquor dealers, within the jurisdiction of this court, without having paid the special excise tax of $1,000.00, in violation of Section 206, Title 26, U. S. C. A. The defendants have demurred to the Indictment, challenging the constitutionality of the Act of Congress, as set forth in 206, supra, because it violates the provisions of Article 1, Section 8, Clause 1, of the constitution of the United States, which reads as follows:

"Section 8. The Congress shall have power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States";

The Act of Congress under which the defendants are prosecuted provide that there shall be levied, collected, and paid annually a special excise tax of $1,000.00, in the case of every person carrying on the business of a retail liquor dealer in any state contrary to the laws of such state, or in any place therein which the carrying on of such business is prohibited by local or municipal law. Under the provisions of Section 205, Title 26, U. S. C. A., retail dealers in liquor are required to pay an annual excise tax of $25.00. It is contended the provisions of the statute requiring the payment of $1,000.00 in states where the carrying on of such business is prohibited by state law violates the uniformity provision of the constitution, because the "rate" or "amount" of an excise must be the same throughout the United States, and must operate throughout the United States uniformally from a geographical standpoint, for the reason the excise must be for the same amount or at the same rate in every state in the union wherein the subject of the excise may be found, and that the uniformity of the excise has reference to geographical uniformity.

Head Money Cases, 112 U. S. 596, 28 L. Ed. 798.
Billings v. United States, 232 U. S. 261, 58 L. Ed. 598.
Knowlton v. Moore, 178 U. S. 96, 44 L. Ed. 968.
4 LaBelle Iron Works v. U. S., 256 U. S. 377, 65 L. Ed. 998.
Patton v. Brady, 184 U. S. 622, 46 L. Ed. 713.
Brushaber v. Union Pac. R. Co., 240 U. S. 1, 60 L. Ed. 493.
Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed., 389.
United States v. Singer, 15 Wall. 118, 21 L. Ed. 49.

It is well established by the authorities above cited that the uniformity of the excise has reference to its geographical operation. I am of the opinion the statute challenged meets all the requirements of the rule established by the authorities.

Counsel for the defendant have fallen into the error of assuming that the subject of the tax is the business of carrying on that of a retail liquor dealer, and while that is part of the subject of the tax, I am unable to reach the conclusion that that is the whole subject of the tax. It would appear that the subject of the tax is that of a retail liquor dealer in a state or place within the state where such business is rendered illegal under the laws of the state. The taxes

imposed are upon an unlawful business and operate uniformally throughout the United States, where such unlawful business is engaged in. The $25.00 tax provided for under Section 205, supra, is a uniform tax provided for upon a legal business and is a uniform tax wherever such business is engaged in.

In the case of James Clark Distilling Company vs. Western Maryland R. R. Co., 242 U. S. 311, 61 L. Ed. 326, the court sustained the Webb-Kenyon Act, prohibiting the transportation of intoxicating liquors into states prohibiting the sale of such liquors, because its provisions applied to all states within the class and under the power of Congress to regulate interstate commerce.

In the case of Poe vs. Seaborn, 282 U. S. 101, 75 Law Ed. 239, the court had under consideration the constitutionality of income tax as provided for in Sections 210 and 211 of the Revenue Act of 1926. The sections provided a uniform rate of taxation on incomes, but were attacked on the ground of alleged nonuniformity, for the reason in some of the states the income of the wife belonged to the husband, while in other states the income of the wife was her own, and for that reason it was contended the tax could not be uniform throughout the United States. The Court sustained the constitutionality of the act, and in the opinion said:

"The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic. Billings v. United States, 232 U. S. 261, 58 L. Ed. 596, 34 S. Ct. 421; Head Money Cases (Edye v. Robertson), 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247; Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 S. Ct. 747, Any differences of state law which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. Florida v. Mellon, 273 U. S. 12, 71 L. Ed. 511, 47 S. Ct. 265."

See Continental Illinois Bank & Trust Co. vs. United States, 65 Fed. (2) 506; Gottlieb vs. White, Collector, 69 Fed. (2) 792.

My conclusion is that the Act operates uniformally upon the subject of the tax, that is, wherever the unlawful business of a retail liquor dealer is carried on, and that the Act meets all necessary constitutional requirements.

The demurrer is overruled.

In United States District Court

Order overruling demurrer

Filed Nov. 10, 1934

Be It Remembered, that on this 9th day of November 1934 there came on for hearing before the court the demurrer filed herein by the defendants to the indictment on file in this cause, and the court having fully considered said demurrer, and having heard the argument of counsel finds that said demurrer should be overruled.

It Is Therefore Ordered by the court that the defendants' demurrer to the indictment herein be and the same is hereby in all respects overruled, with exceptions allowed the defendants.

F. E. KENNAMER,
United States District Judge.

[File endorsement omitted.]

6 In United States District Court

Judgment

On this 9th day of November, A. D. 1934, the District Court of the United States for the Northern District of Oklahoma, sitting in Special March 1934 Term at Tulsa, met pursuant to adjournment, Hon. F. E. Kennamer, Judge, present and presiding. H. P. Warfield, Clerk, U. S. District Court. C. E. Bailey, United States Attorney. John P. Logan, United States Marshal.

Public proclamation having been duly made, the following proceedings were had and entered, to wit:

Now on this 9th day of November, A. D. 1934, comes the United States Attorney, representing the Government herein and the defendants Roger Kesterson and Bernord Roberts appearing in person and by counsel Frank Hickman. The defendants are each arraigned and each enters his plea of Nolo Contendere, as charged in the Indictment heretofore filed herein; which said pleas are accepted by the court. Thereupon, all witnesses are sworn in open court and opening statements of counsel are made. The Government introduces evidence and proof with the following witnesses: L. D. Kern, J. J. Steagall, D. W. Woodhouse. And thereafter, the Government rests. Thereupon, statement of counsel Frank Hickman is made. And thereafter, after being fully advised in the premises and considering the facts and the evidence herein, it is ordered by the court that said defendants be adjudged guilty and that judgment and sentence be imposed as follows:

Roger Kesterson be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in a County Jail for a period of Six (6) months, and that he pay a fine unto the United States in the sum of Five Hundred ($500.00) Dollars, and in default thereof, further stand committed until said fine is paid or until released by due process of law.

Bernord Roberts be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in a County Jail for a period of Ninety (90) days, and that he pay a fine unto the United States in the sum of One Hundred ($100.00) Dollars, and in default thereof, further stand committed until said fine is paid or until released by due process of law.

7 And thereafter, it is ordered by the court that defendants Roger Kesterson and Bernord Roberts be given to November 13th, 1934, to file bonds on appeal herein. It is further ordered

that bond of Defendant Kesterson be set in the sum of $2,500.00; Defendant Roberts' bond, sum of $1,000.00. Said defendants to stand on present bonds until that date.

In United States District Court

Notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit

(Filed Nov. 9, 1934)

I

The names and addresses of the appellants are as follows: Roger Kesterson, 1115 South Main Street, Tulsa, Oklahoma. *Bernard* Roberts, 1115 South Main Street, Tulsa, Oklahoma.

II

The names and addresses of appellants' attorneys are as follows: Frank Hickman, 617 Ritz Building, Tulsa, Oklahoma, and Irvine E. Ungerman, 617 Ritz Building, Tulsa, Oklahoma.

III

The offense with which appellants were charged and for which they were found guilty by the trial court, a jury having been waived, is a violation of Section 206, Title 26, United States Code Annotated, same being Act of Congress of February 26, 1926, c. 27, Section 701, 44 Stat. 95, in that the appellants on or about the 22nd day of August 1934, carried on the business of retail liquor dealers at 1115 South Main Street, Tulsa, Oklahoma, and then and there possessed a quantity of whiskey, all of which is contrary to the Statutes of the State of Oklahoma, without having paid the special excise tax of $1,000.00 required by the provisions of said Act of Congress.

IV

Judgment was rendered by the court on the 9th day of November 1934, and the appellant, Roger Kesterson, was sentenced to six months imprisonment and assessed a fine of $500.00 and the appellant, *Bernard* Roberts, was sentenced to ninety days imprisonment and assessed a fine of $100.00.

V

8 We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

ROGER KESTERSON,
BERNORD ROBERTS,
Appellants.

Dated this 9th day of November 1934.

The grounds of appeal are as follows:

The appellants demurred to the indictment upon the ground and for the reason that said Act of Congress is unconstitutional in that it violates the provisions of Article 1, Section 8, Clause 1 of the Constitution of the United States, in that the excise tax therein provided for is not a uniform excise as required by the Constitution and does not operate generally throughout the United States, and upon the further ground that the excise tax therein provided for is in the nature of a penalty in connection with matters over which Congress has no authority to legislate. The demurrer of the defendants was overruled by the court and exceptions allowed. Thereupon, a jury having been waived, the court heard the evidence and found the appellants guilty of a violation of said Act of Congress. The appellants appeal upon the ground that said Act of Congress is unconstitutional and that the trial court erred in overruling their demurrer to the indictment and in finding them guilty of a violation of said Act of Congress and sentencing them accordingly.

FRANK HICKMAN,
IRVINE E. UNGERMAN,
Attorneys for Appellants.

Service of a copy of the foregoing notice is hereby acknowledged to have been made this 9th day of November, 1934.

C. E. BAILEY,
United States Attorney.

[File endorsement omitted.]

Recital as to bonds

[Supersedeas bonds, approved by the trial judge, with appellants as principals and John W. Riley, Ashley Russell, and
9 Jessie E. Hensley as sureties on each of said bonds, were filed in the District Court on Nov. 13, 1934, as to Bernord Roberts in the sum of 1,000 and as to Roger Kesterson in the sum of $2,500.]

In United States District Court

Order and direction to clerk for record on appeal

Filed Nov. 10, 1934

Now on this 9th day of November, 1934, the clerk of this court having brought to the attention of the court that the defendants herein have served and filed with him their notice of appeal from the judgment and orders made in this cause on the 9th day of November, 1934, and counsel for all parties herein now appearing before the court for an order of the court to the clerk of the court with regard to the preparation of the record on appeal as required by the rules of the Supreme Court of the United States promulgated May 7, 1934, and the court having been advised in the premises.

It Is Ordered that the clerk of this court include in the record or transcript for appeal the following:

1. The indictment herein.
2. The demurrer to the indictment.
3. Order overruling demurrer.
4. Opinion filed by the court herein.
5. Arraignement and plea.
6. Judgment and sentence.
7. Notice of appeal.
8. Supersedeas bonds.
9. This order.
10. Transcript of clerk's minutes as appears on his docket.
11. Certificate of clerk.

F. E. KENNAMER,
United States District Judge.

[File endorsement omitted.]

10 In United States District Court

Clerk's docket entries

Oct. 5, 1934. Ent. return Grand Jury with indictment, order to file and for warrant.
Filed indictment. Ent. order fixing bond at $
Filed bonds of Roger Kesterson, $3,500.00, and Bernord Roberts $500.00.
Filed record of vote of Grand Jury.
Oct. 18, 1934. Enter order cause set for trial for 11-9-34.
Nov. 9 " File demurrer of defendants.
" 9 " File memorandum opinion on defendants demurrer.
" 9 " File and enter order demurrer of defendants overruled, exception allowed. (F. E. Kennamer, Judge.)
" 9 " Defts. both arraigned—each plea of Nolo Contendere—statements made—witnesses sworn and examined—Found guilty as to each Deft.
Judg. and sent—Roger Kesterson: 6 Mo. Co. Jail to custody of Atty. Gen. or his authorized rep.—Fine $500.00.
Judg. and sent—Bernord Roberts: 90 days Co. Jail to custody of Atty. Gen. or his authorized Rep.—Fine $100.00.
Ent. order Defts. given till 13th to file bonds on appeal—appeal bonds fixed at $2,500.00 for Kesterson and $1,000.00 for Roberts—Defts. to stand on present bonds till 13th (or till appeal bonds filed—)
" 9 " File notice of appeal to U. S. C. C. A. for 10th Circuit.
" 10 " File and enter order of 11-9-34, and direction to clerk for record on appeal (F. E. Kennamer, Judge.)
" 13 " File supersedeas bond of *Bernard* Roberts, Amt. $1,000.00, approved, F. E. Kennamer, Judge.
" 13 " File supersedeas bond Roger Kesterson, Amt. $2,500.00 approved, F. E. Kennamer, Judge.

11 [Clerk's certificate to foregoing transcript omitted in printing.]

12 *In United States Circuit Court of Appeals for the Tenth Circuit*

Order of submission January 29, 1935

Before Honorable Robert E. Lewis, Honorable George T. McDermott, and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frank Hickman, Esquire, appearing for appellants, Joe W. Howard, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

13 In United States Circuit Court of Appeals, Tenth Circuit

April term, 1935

No. 1176

ROGER KESTERSON AND BERNORD ROBERTS, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Oklahoma

Frank Hickman (Hickman & Ungerman were with him on the brief), for appellants.

Joe W. Howard, Assistant United States Attorney (C. E. Bailey, United States Attorney, was with him on the brief), for appellee.

Before LEWIS, MCDERMOTT, and BRATTON, Circuit Judges

Opinion April 8, 1935

LEWIS, Circuit Judge, delivered the opinion of the court.

14 An indictment returned against appellants charged them with carrying on the business of a retail liquor dealer in Tulsa, Oklahoma, on August 17, 1934, contrary to the laws of said state, without having paid the special excise tax of $1,000 as required by 26 U. S. C. A., Sec. 206.

Section 205 (a), 26 U. S. C. A., prescribes a $25 tax for retail liquor dealers, while said section 206 prescribes a $1,000 tax for retail liquor dealers where state or local law prohibits the carrying on of such business.

Appellants challenged the constitutionality of the statute by demurrer upon these grounds: (1) That said section 206 is violative of

Article I, Sec. 8, Clause 1 of the United States Constitution. (2) That the tax provided by said section is in the nature of a penalty, and not for the purpose of raising revenue.

The court below overruled the demurrer, and held section 206 levying a special excise tax of $1,000 did not violate the constitutional requirement of uniformity, notwithstanding section 205 levied an annual excise tax of $25 on retail dealers, because section 206 operates uniformly throughout the United States wherever the unlawful business of retail liquor dealers is carried on. The opinion may be found in 8 F. Supp. 680.

The Twenty-first Amendment which repealed the Eighteenth Amendment of the Constitution was ratified December 5, 1933. Thereupon the Eighteenth Amendment became inoperative. The National Prohibition Act, to the extent its provisions rested upon the grant of authority to Congress by the Eighteenth Amendment, immediately fell. United States v. Chambers, 291 U. S. 217.

The authority of Congress thereafter to prescribe this $1,000 levy must be found in Article I, Section 8, Clause 1, of the Constitution, which authorizes Congress to enact revenue measures. It requires that excise taxes shall be uniform throughout the United States. Counsel argue the applicability of numerous Supreme Court decisions which hold that constitutional uniformity means geographical uniformity, but they do not discuss the primary question of whether section 206 prescribes a tax or a penalty.

15 In passing upon section 206 we must have proper regard for the right of Congress to enact revenue measures and must construe the act, if fairly possible, to be constitutional. At the same time we must remember that Congress derives its power to legislate from the Constitution. The exaction of $1,000 under said section upon retail liquor dealers where the business is unlawful necessarily serves to restrain and regulate. Taxing statutes have been sustained where the courts have been able to say that the statute was primarily a revenue measure, although Congress had the incidental motive of discouraging the subject of the tax.

Mr. Justice Day, in United States v. Doremus, (1918) 249 U. S. 86, summarized much of the law up to that time. By the Harrison Narcotic Drug Act Congress undertook to regulate the sale of narcotic drugs in the United States. The act imposed a special tax on the manufacture, importation, sale or gift thereof. It aimed by the imposition of penalties to confine the sale of drugs to registered dealers, to physicians, and to persons with prescriptions. The law provided for registration, keeping of records, and the giving of prescriptions. Doremus, a physician, was indicted for dispensing to a "dope fiend" a certain quantity of heroin without a written order required on a form issued by the Commissioner of Internal Revenue and not in the course of his practice. Upon demurrer to the indictment the District Court held the act unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police

power reserved to the states. The lower court was reversed. The court said in part:

"The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared that it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. License Tax Cases, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power
16 exert a thority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. Veazie Bank v. Fenno, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. McCray v. United States, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see Flint v. Stone Tracy Co., 220 U. S. 107, 147, 153, 156, and cases cited.

"Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. License Tax Cases, 5 Wall., supra.

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. In re Kollock, 165 U. S. 526, 536.

"The legislation under consideration was before us in the case concerning sec. 8 of the act, and in the course of the decision we said: 'It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right'."

The court concluded that the provisions as to registration, the keeping of records, and prescriptions had a proper relation to the raising of revenue. Four Justices dissented from that conclusion

The Harrison Narcotic Drug Act has since been regarded
17 as valid as a revenue measure, but in Linder v. United States, 268 U. S. 5, at 17, Mr. Justice McReynolds warns:

"Congress cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the power reserved to the States, is

invalid and cannot be enforced. McCulloch v. Maryland, 4 Wheat. 316, 423; License Tax Cases, 5 Wall. 462; United States v. DeWitt, 9 Wall. 41; Keller v. Unitied States, 213 U. S. 138; Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20."

Penalties and taxes are considered in the Child Labor Tax Case, 259 U. S. 20. By the Child Labor Tax Congress imposed an "excise tax" equivalent to 10% of the net profits for the year upon any person employing child labor in violation of the statute regulating such employment. The Drexel Furniture Company of North Carolina sued to recover back a tax paid under protest for violation of said act. Plaintiff recovered in the District Court, and the judgment was affirmed. In delivering the opinion of the court Mr. Chief Justice Taft said at page 36 et seq.:

"The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function, under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by Sec. 8, Article I, of the Federal Constitution. * * * Does the law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the
18 so-called tax as a penalty? If a tax, it is clearly an excise.

If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. * * * Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in

the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.

"Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."

In Hill v. Wallace, 259 U. S. 44, the act regulating by taxation the business of grain exchanges was held unconstitutional. In Lipke v. Lederer, 259 U. S. 557, so-called taxes retained in force and imposed by section 35 of the National Prohibition Act upon dealing in liquor prohibited and made criminal by the act were held to be in reality penalties.

"The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. Child Labor Tax Case. When by its very nature the inposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605. Evidence of crime (Sec. 29) is essential to assessment under Sec. 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of law—the definite function of a penalty. O'Sullivan v. Feliz, 233 U. S. 318, 324."

Section 206 (44 Stat. 95) was passed while we had the Eighteenth Amendment and National Prohibition, and most states had their own prohibition laws. By payment of the $1,000 "special excise tax" the taxpayer acquired no license or authority to carry on the business of retail liquor dealer contrary to state or local prohibitory laws (License Tax Cases, 5 Wall. 462), nor did he acquire a license authorizing him to violate the National Prohibition Act, as long as it remained the law. It is apparent we think that the $1,000 exaction was prescribed as a regulatory measure to provide an additional penalty. At the time charged in the indictment the tax in "wet" territory was, theretofore had been, and since has been only $25. The main purpose of making it forty-fold in "dry" territory was, it seems to us, to aid in the suppression of dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment. Several courts have decided recently that the $1,000 exaction is a penalty and not a tax. Cleveland v. Davis (S. D. Ala.) 9 F. Supp. 337; Green v. Page, Collector (S. D. Ga.) decided January 8, 1935; Constantine v. United States (C. C. A. 5) decided March 15, 1935.

Counsel press on our attention the first issue raised by the demurrer. Inasmuch as we are of opinion that said section 206 provided a

penalty and not a tax, it seems unnecessary to determine whether that section violated the uniformity requirement of the Constitution.

Reversed with directions to vacate the judgment and enter an order discharging appellants.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

21 In United States Circuit Court of Appeals, Tenth Circuit

Judgment April 8, 1935

Before Honorable Robert E. Lewis, Honorable George T. McDermott, and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgments and sentences of the said district court in this cause be and the same are hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to vacate the judgment and enter an order discharging appellants.

Clerk's note re mandate

[On April 27, 1935, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Court.]

25 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

No. 46, October term, 1935

Order allowing certiorari

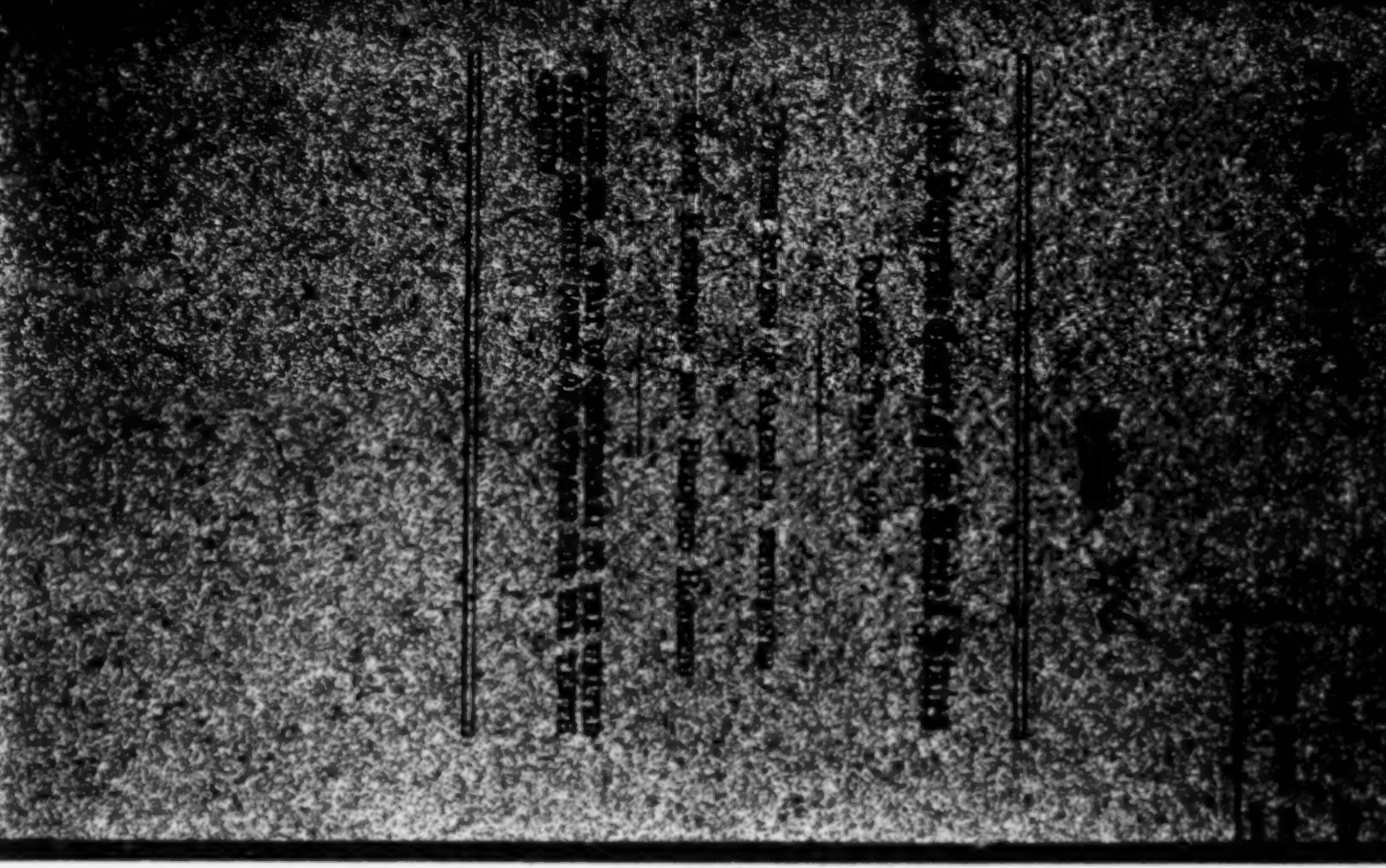
Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 40.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File no. 39,581. U. S. Circuit Court of Appeals, Tenth Circuit. Term no. 46. The United States of America, petitioner, vs. Roger Kesterson and Bernord Roberts. Petition for a writ of certiorari and exhibit thereto. Filed May [illegible], 1935. File no. 46 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: [illegible]



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specifications of error to be urged	4
Reasons for granting the writ	4

CITATIONS

Cases:

United States v. *Constantino*, No. 938, October Term, 1934 — 4

Statutes:

Revenue Act of 1926, Sec. 701, c. 27, 44 Stat. 95 (U. S. C., Title 26, Secs. 192, 206) — 5

133358—35

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KESTERSON AND BERNORD ROBERTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above case on April 8, 1935 (R. 18), reversing a judgment of the United States District Court for the Northern District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 3–5) is reported in 8 F. Supp. 680. The opinion of the Circuit Court of Appeals (R. 13–18) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 8, 1935 (R. 18). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule 11 of the Rules of Practice and Procedure with Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95, U. S. C. App. Title 26, Sec. 206), imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, is valid, in view of the repeal of the Eighteenth Amendment.

STATUTES INVOLVED

Section 701 of the Revenue Act of 1926 will be found in the Appendix, *infra*, p. 5.

STATEMENT

On October 5, 1934, the United States grand jury for the Northern District of Oklahoma returned an indictment charging that the respondents on August 17, 1934, carried on the business of a retail liquor dealer in that district, contrary to the laws of the State of Oklahoma, without having paid the special excise tax provided by Section 701 of the Revenue Act of 1926 (R. 1).

On November 9, 1934, the respondents filed a demurrer to the indictment on the grounds that Section 701 was unconstitutional, in that it violated the provisions of Article I, Section 8, Clause 1 of the Constitution requiring that all duties, imposts, and excises be uniform throughout the United States, and in that the "excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate" (R. 2).

The District Court overruled the demurrer (R. 5), stating (R. 4)—

> It would appear that the subject of the tax is that of a retail liquor dealer in a state or place within the state where such business is rendered illegal under the laws of the state. The taxes imposed are upon an unlawful business and operate uniformly throughout the United States, where such unlawful business is engaged in.

The respondents then each pleaded *nolo contendere*. Kesterson was sentenced to serve six months in jail and to pay a fine of $500. Roberts was sentenced to serve ninety days in jail and to pay a fine of $100 (R. 6).

The respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments of conviction (R. 13–18).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "was prescribed as a regulatory measure to provide an additional penalty * * * to aid in the suppression of dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment."

2. In holding that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ in this case are the same as those advanced in the Government's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in the case of *United States of America, Petitioner,* v. *Gus L. Constantine, alias Dr. Gus,* No. 938, filed on May 2, 1935, and are therefore not repeated here.

For the reasons urged in that petition, it is respectfully submitted that the present petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Section 701 of the Revenue Act of 1926 (U. S. C. App., Title 26, Sec. 206) provides that—

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.
>
> Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1928

FILE COPY

OCT 29

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KERFERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specifications of errors to be urged	5
Argument	6
Conclusion	9

CITATIONS

Cases:	
Child Labor Tax Case, 259 U. S. 20	5, 8
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311	4, 8
Flint v. *Stone Tracy Co.*, 220 U. S. 107	8
Head Money Cases, 112 U. S. 580	8
Hill v. *Wallace*, 259 U. S. 44	5, 8
License Tax Cases, 5 Wall. 462	7
Lipke v. *Lederer*, 259 U. S. 557	5
McCray v. *United States*, 195 U. S. 27	8
United States of America v. *Gus L. Constantine, alias Dr. Gus*, No. 40, Oct. Term, 1935	2, 5, 6, 8
United States v. *Doremus*, 249 U. S. 86	8
Veazie Bank v. *Fenno*, 8 Wall. 533	8
Constitution and Statutes:	
Art. I, sec. 8, clause 1, U. S. Constitution	6, 8
Revenue Act of 1918, c. 18, 40 Stat. 1057, sec. 1001	6
Revenue Act of 1926, c. 27, 44 Stat. 9, 95, sec. 701 (U. S. C. A., title 26, secs. 206, 192)	2

25914—35

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KESTERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 2–4) is reported in 8 F. Supp. 680. The opinion of the Circuit Court of Appeals (R. 9–14) is reported in 76 F. (2d) 913.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 8, 1935. (R. 14.) The petition for a writ of certiorari was filed May 8, 1935, and was granted October 14, 1935. (R. 14.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934, and effective September 1, 1934, the finding of guilty by the trial court having been rendered November 9, 1934. (R. 5.)

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926, imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, became invalid with the repeal of the Eighteenth Amendment, where the business was carried on contrary to State law.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95; U. S. C. A., Title 26, Secs. 206, 192) is set forth in the Government's brief in *The United States of America* v. *Gus L. Constantine, alias Dr. Gus,* No. 40 on the docket of this Court, which is to be heard immediately preceding the argument of this case. The statute will therefore not be repeated here.

STATEMENT

On October 5, 1934, the United States grand jury for the Northern District of Oklahoma re-

turned an indictment charging that the respondents did, on August 17, 1934, "engage in and carry on the business of a retail dealer in intoxicating liquors, contrary to the laws of the State of Oklahoma by then and there have [having] and possessing for retail sales certain intoxicating liquor, to wit: Fifty-four Pints of Whiskey, at a place, to wit: at 1115 South Main Street in the city of Tulsa * * * without having paid the special excise tax of $1,000 therefor, as required by the provisions of section 206, title 26, U. S. C. A." (R. 1–2.)

On November 9, 1934, the respondents filed a demurrer to the indictment on the ground that Section 701 is unconstitutional (1) in that it violates the provisions of Article I, Section 8, Clause 1 of the Constitution requiring that all duties, imposts, and excises be uniform throughout the United States, and (2) in that the "excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate." (R. 2.)

The demurrer was overruled, with exceptions allowed the respondents. (R. 4–5.) From an opinion rendered by the District Court it appears that the respondents' principal contention was that the provisions of the statute here involved, requiring the payment of a special excise tax of $1,000 in States where the carrying on of the businesses specified is prohibited, violate the uniformity provision of

the Constitution, "because the 'rate' or 'amount' of an excise must be the same throughout the United States, and must operate throughout the United States uniformally from a geographical standpoint, for the reason the excise must be for the same amount or at the same rate in every state in the union wherein the subject of the excise may be found." The court pointed out that the subject of the tax was not alone that of the business of a retail dealer, but that of a retail dealer in a State or place within the State where such business is rendered illegal by the laws of the State, and that the tax applies uniformly throughout the United States wherever such unlawful business is engaged in. Among other cases, the court referred to *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, where the Webb-Kenyon Act, prohibiting the shipment of liquor into any State to be there used in violation of the laws thereof, was sustained by this Court, as against the objection that it was not uniform in operation, because (p. 327) "The act uniformly applies to the conditions which call its provisions into play."

The District Court concluded (R. 4)—

> that the Act operates uniformally upon the subject of the tax, that is, wherever the unlawful business of a retail liquor dealer is carried on, and that the Act meets all necessary constitutional requirements.

The court did not specifically discuss the question whether the statute prescribed a tax or a penalty,

and it does not appear from its opinion whether that point was pressed.

Upon the overruling of the demurrer, the respondents pleaded *nolo contendere*. The trial was to the court, which found the respondents guilty as charged. Kesterson was sentenced to six months in jail and to pay a fine of $500. Roberts was sentenced to serve ninety days in jail and to pay a fine of $100. (R. 5.)

The respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments of conviction on the ground that the levy imposed by Section 701 was a penalty and not a tax under the principles laid down in the *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; and *Lipke* v. *Lederer*, 259 U. S. 557. The court did not pass upon the first issue raised in the demurrer relative to the purported lack of uniformity. (R. 9–14.) On October 14, 1935, this Court granted the Government's petition for a writ of certiorari and assigned the case for argument immediately following No. 40, *The United States of America* v. *Gus L. Constantine, alias Dr. Gus*, in which the same questions are involved.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "was prescribed as a regulatory measure to provide an additional penalty * * * to aid in the suppression of

dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment."

2. In holding that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In reversing the judgment of the District Court.

ARGUMENT

All of the arguments pertinent to the issues in this case are fully set forth in the Government's brief in the case of *The United States of America* v. *Gus L. Constantine, alias Dr. Gus,* No. 40, which is to be argued immediately preceding the instant case. It is unnecessary to do more, therefore, than summarize the pertinent arguments, reference being made for a more complete discussion of the various arguments to the brief in the *Constantine case.*

Section 701 does not impose a penalty as to "a subject over which Congress has had no power since the repeal of the Eighteenth Amendment." The statute in question rests upon the power of Congress under Article I, Section 8, Clause 1, of the Constitution to "lay and collect Taxes, Duties, Imposts, and Excises * * *". It has never been dependent upon the Eighteenth Amendment for its constitutional basis. The section had its origin in sub-section 12 of Section 1001 of the Revenue Act

of 1918. It was therefore enacted prior to the effective date of the Eighteenth Amendment and the passage of the National Prohibition Act, and there is nothing in its history to indicate that it was part of the enforcement machinery of the Eighteenth Amendment or that it was enacted as an aid to national prohibition. It is denominated in the Revenue Act of 1918 a "special excise tax". Its legislative history shows that it was enacted primarily as a revenue measure, and it has consistently been treated as a tax by the Treasury Department with the exception of the period during which national prohibition was in effect, when the basic tax imposed by the section was doubled, upon evidence of manufacture and sale contrary to Federal law, by virtue of Section 35, Title II, of the National Prohibition Act, and thus became a penalty. Congress from early times has imposed excise taxes upon the business of dealing in liquor. *License Tax Cases*, 5 Wall. 462. The section in question differs from these admittedly valid measures in that it imposes a special tax only upon illicit liquor dealers, thus placing them in a separate category for tax purposes. Having in mind the greater revenue derived from illicit liquor businesses and the greater expense to which the Government is put in the collection of taxes from such businesses, it is submitted that Congress has the power to impose heavier taxes upon such businesses and that to do so does not constitute the levy a penalty.

Subject to the requirement of geographical uniformity, Congress may select the subjects of taxation. *United States* v. *Doremus*, 249 U. S. 86. The fact that other motives in addition to the raising of revenue may impel the exercise of the Federal taxing power does not authorize the courts to inquire into that subject. *Veazie Bank* v. *Fenno*, 8 Wall. 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. Section 701 is primarily a revenue measure, whatever the incidental purpose behind its enactment may have been.

The statute does not deal with a subject left or committed to the exclusive control of the States under the Tenth Amendment. Unlike the attempts to use the taxing power to dictate and regulate matters of local concern which were declared invalid in the *Child Labor Tax Case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, the section in question is so framed as to give recognition to the announced policies of the States, and as drafted it constitutes a recognition, not an invasion, of State powers. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

Furthermore, the statute meets the requirement of uniformity imposed by Article I, Section 8, Clause 1, of the Constitution, since it deals equally with the subject of the tax wherever it be found. *Head Money Cases*, 112 U. S. 580, and other decisions cited in the Government's brief in the *Constantine case*. The subjects of the tax are unlawfully operated liquor businesses, and the tax is

levied equally upon such businesses wherever they are found.

CONCLUSION

For the reasons stated, we respectfully submit that Section 701 of the Revenue Act of 1926 did not fall with the repeal of the Eighteenth Amendment; that it imposes a true tax and not a penalty; that it does not infringe upon the reserved powers of the States; that it meets the constitutional requirement of uniformity; and that it consequently was within the power of Congress to enact. The judgment of the Circuit Court of Appeals should therefore be reversed and the judgment of the District Court affirmed.

STANLEY REED,
Solicitor General.
JOSEPH B. KEENAN,
Assistant Attorney General.
MAHLON D. KIEFER,
Special Assistant to the Attorney General.
GORDON DEAN,
Special Attorney.
W. MARVIN SMITH,
Attorney.

OCTOBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

Office Supreme Court,
FILED
NOV 4 19
CHARLES ELMORE CR

No. 46

In the Supreme Court of the United States

October Term, 1935.

THE UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROGER KESTERSON AND BERNORD ROBERTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS.

FRANK HICKMAN,
Tulsa, Oklahoma,
Attorney for Respondents.

IRVINE E. UNGERMAN,
Tulsa, Oklahoma,
Of Counsel.

INDEX.

PAGE

Statement..... 1

Argument..... 3

I. Section 710 of the Revenue Act of 1926 (U. S. C. A., Title 26, Section 206) is unconstitutional because it imposes a penalty and not a true excise tax, and fell with the repeal of the Eighteenth Amendment..... 3

II. If said section be held to be a tax and not a penalty it is unconstitutional because it violates Article 1, Section 8, Clause 1, of the Constitution, in that it lacks uniformity as therein required..... 8

Conclusion..... 11

Cases Cited.

Billings v. *United States*, 232 U. S. 261..... 9

Clark Distilling Co. v. *Western Md. Ry. Co.*, 242 U. S. 311..... 11

Florida v. *Mellon*, 273 U. S. 12..... 10

Head Money Cases, 112 U. S. 580..... 9

Kesterson v. *United States*, 76 F. (2d) 913..... 2

Knowlton v. *Moore*, 178 U. S. 41..... 9

Lipke v. *Lederer*, 259 U. S. 557..... 6

Poe v. *Seaborn*, 282 U. S. 101..... 9

United States v. *Chambers*, 291 U. S. 217..... 3

United States v. *La Franca*, 282 U. S. 568..... 6, 7

United States v. *One Ford Coupe*, 272 U. S. 321..... 8

United States v. *Singer*, 15 Wall. 111..... 9-10

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 46

THE UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROGER KESTERSON AND BERNORD ROBERTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF *for the* RESPONDENTS.

Statement.

On October 5, 1934, the United States Grand Jury for the Northern District of Oklahoma returned an indictment charging that respondents on August 17, 1934, carried on the business of a retail liquor dealer in that district, contrary to the laws of the State of Oklahoma, without having paid the special excise tax of $1,000.00 provided by Section 701 of the Revenue Act of 1926 (U. S. C. A., Title 26, Section 206).

On November 9, 1934, respondents filed a demurrer to the indictment on the grounds *(a)* that Section 701 was un-

constitutional in that it violated the provisions of Article 1, Section 8, Clause 1, of the Constitution requiring that all duties, imposts and excises be uniform throughout the United States, and *(b)* that the "excise tax therein provided for is in the nature of penalty and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate."

The District Court overruled the demurrer. Thereupon respondents entered *nolo contendere* pleas, were found guilty as charged, and sentence imposed, Kesterson being sentenced to serve six months in jail and to pay a fine of $500.00 and Roberts being sentenced to serve ninety days in jail and to pay a fine of $100.00.

The respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments of conviction, holding that Section 701 "was prescribed as a regulatory measure to provide an additional penalty • • • to aid in the suppression of dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment," and that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the states. *Kesterson* v. *United States,* 76 F. (2d) 913.

The decision of the Circuit Court sustains the second ground contained in respondents' demurrer. The court deemed it unnecessary to pass upon the first ground urged in the demurrer, that is, the question of uniformity, because of its holding that Section 701 was not a tax but a penalty.

ARGUMENT.

I.

Section 701 of the Revenue Act of 1926 is unconstitutional because it imposes a penalty and not a true excise tax, and fell with the repeal of the Eighteenth Amendment.

II.

If said section 701 be held to impose an excise tax and not a penalty it is unconstitutional because it violates article 1, section 8, clause I of the Constitution, in that it lacks uniformity as therein required.

We respectfully submit that the first question thus presented for determination, if decided in favor of respondents, is decisive of the entire controversy, this question being: Is the exaction levied by Section 701 a tax or a penalty? However, we deem it proper to argue both propositions upon which we rely. These will be presented separately.

I.

At the outset we believe it must be conceded that, if the exaction is a penalty, it fell with the repeal of the Eighteenth Amendment. *United States* v. *Chambers*, 291 U. S. 217.

Section 701 first existed, but in slightly different form, in Section 1001 of the Revenue Act of 1918, approved February 24, 1919. This was after the ratification of the Eighteenth Amendment, which was on January 29, 1919, although same did not become effective until one year thereafter. Acts of Congress, creating war-time prohibition, had, previous to the ratification of the Eighteen Amendment, been

passed and approved. The National Prohibition Act, dependent for its constitutionality on the amendment, was enacted October 28, 1919, but was not operative until the effective date of the amendment—January 29, 1920.

Thereafter, in its then form, Section 701 was re-enacted as subsection 12 of Section 1001 of the Revenue Act of 1921, and later as subsection 9 of Section 701 of the Revenue Act of 1924, and finally in its present form as Section 701 of the Revenue Act of 1926.

In addition to the tax against unlawful liquor dealers many lawful occupations were the subject of taxation in the Revenue Acts of 1918, 1921 and 1924. All except the unlawful liquor dealer are found omitted in the Revenue Act of 1926, at which time the Eighteenth Amendment and the National Prohibition Act were in force.

Let us then first inquire into the facts which we contend show that Congress, in 1926, was actuated primarily by an attempt to suppress the unlawful traffic in liquor by the exaction in question instead of an attempt to raise revenue. It should be remembered that the many occupations included in the several Revenue Acts exacted prior to 1926, although affording a source of great revenue, were omitted from the act in question. In the House Report on the Revenue Bill of 1918, in which Section 701 had its origin, it appeared that one of the principal objects of the bill was to aid in financing the war, and The Committee on Ways and Means estimated that the special taxes therein provided for would yield about $165,000,000.00 annually. In 1926, elimination of the occupational taxes was occasioned by an increased surplus in the Treasury which permitted a general reduction in taxes. Yet the one occupation retained by the

Act of 1926 was unlawful under existing law on account of which no revenue from that source could be expected. Furthermore, it is a matter of history that during the prohibition era, and especially in 1926, great efforts were exerted by the Government to suppress the unlawful traffic in liquor and sterner penalties for violation were constantly being urged. However, prior to 1929, these penalties were comparatively light. By the Act of March 2, 1929, they were greatly increased, fixing a maximum fine of $10,000.00 and maximum imprisonment of five years. On July 30, 1926, shortly after the effective date of the Revenue Act of 1926, the Treasury Department, by its regulation numbered 3911, specifically construed and held the exaction by the act to be a penalty and not a tax.

These facts, we believe, tend to demonstrate that the exaction of the $1,000.00 excise by the Act of 1926 is not a true tax but is a penalty involving the idea of punishment for infraction of the law.

Under the provisions of Section 205, Title 26, U. S. C. A., wholesale liquor dealers are required to pay an annual excise tax of $100.00, retail dealers $25.00, wholesale dealers in malt liquors $50.00, and retail dealers in malt liquors $20.00. Under Section 701, however, all liquor dealers, whether wholesale or retail, in "dry" states or communities, are required to pay the same sum, namely, $1,000.00, annually, and in the case of retail dealers a sum forty times greater than a similar occupation in so-called "wet" states. It is significant that Section 701 exacts the same amount from all kinds of handlers of intoxicating liquor instead of, as liquor-taxing acts do, and as is provided by Section 205, Title 26, U. S. C. A., making the exaction fit the business

done. It cannot be contended that there is no logic in this argument because all handlers of intoxicating liquors contrary to state laws or municipal ordinances "were in the same boat" because such was not the case. In fact, violations of state and municipal laws and ordinances placed the violators in different categories, because some thereby committed felonies while others misdemeanors punishable by small fines.

In determining the question before us we should endeavor to distinguish between a "tax" and a "penalty." In the case of the *United States* v. *La Franca,* 282 U. S. 568, this court, in passing upon Section 701 of the Revenue Act of 1924, said:

> "A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if any exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. * * *"

In *Lipke* v. *Lederer,* 259 U. S. 557, we find:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. * * * When by its very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States,* 188 U. S. 605. Evidence of crime (section 29) is essential to assessment under section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of government' and clearly involves the idea of punishment for infraction of law—the definite function of a penalty. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324."

We believe that the case of *United States* v. *La Franca, supra,* is decisive of the question under discussion. It is true that the court there had under consideration Section 701 of the Revenue Act of 1924. But little difference is noted between that act, as pertaining to unlawful liquor dealers, and the same section in the Revenue Act of 1926. By the terms of Section 52, Title 27, U. S. C. A., being c. 85, Title 11, Section 35, Act of October 28, 1919, the exaction was doubled. The Government in the *La Franca* case sought judgment for the doubled tax, after conviction of La Franca for infraction of the law that subjected him thereby to payment of the tax. He entered a defense of double jeopardy, contending that the tax levied under Section 701 of the Act of 1926, doubled by the section of the National Prohibition Act above mentioned, was a penalty for infraction of the law and not a true excise tax. This court sustained that contention, saying:

> "Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties."

It is argued by counsel for petitioner herein, and in the companion case of *United States* v. *Constantine,* No. 40, October Term, 1935, that Section 701 became a penalty, and was so held, because of the provisions of the previously enacted section of the National Prohibition Act referred to. If this argument is sound, then why was not judgment entered in favor of the United States for the tax levied by the revenue act in the amount therein imposed, and not for the double amount sought? In other words, if the tax fixed by Section 701 of the Revenue Act of 1924 was a true excise tax and not a penalty, why was the Government denied

judgment for the amount thereof? The answer is found in the decision—that same is a penalty. It is to be remembered that this court has held that a tax on intoxicating liquor does not cease to be such because the sovereign has declared none shall be manufactured. *United States* v. *One Ford Coupe*, 272 U. S. 321.

Counsel for petitioner, in their brief in the *Constantine* case, take the view that the excise tax in question was a true tax when first imposed by the Revenue Act of 1918, became a penalty during the period the National Prohibition Act was in force, and thereafter reverted to its true status as a tax (p. 22). A complete answer to this strange contention is that the section in controversy between us was enacted into law in 1926, during the era of national prohibition. So that, at the time of its very enactment it became a penalty, yet, they argue that same is a true excise tax imposed for the support of government.

We respectfully submit that the decision of the Circuit Court of Appeals is correct and should be affirmed.

II.

If the exaction provided by Section 701 is not a penalty but a true tax, we submit it is unconstitutional because of non-uniformity. Article 1, Section 8, Clause 1, of the Constitution requires that "all duties, imposts and excises shall be uniform throughout the United States."

By the provisions of Section 205, Title 26, U. S. C. A., retail liquor dealers are taxed $25.00 and by Section 206 (Section 701, Revenue Act of 1926) $1,000.00 in "dry" states or municipalities. The subject of the two so-called taxes is the same, namely, retail liquor dealers. The "rate" or

"amount" of the exaction varies according to state laws or local municipal regulations or ordinances. It is our contention that the "rate" or "amount" of an excise must be the same throughout the United States and must operate uniformly from a geographical standpoint; in other words, that Congress is prohibited from levying excises upon one subject of taxation in different amounts or at different rates in the different states of the Union.

This court has held that the uniformity required by the Constitution has reference to the various localities in which the tax is intended to operate and has always been used with reference purely to geographical uniformity and as synonymous with the expression, "to operate generally throughout the United States." *Head Money Cases,* 112 U. S. 580; *Billings* v. *United States,* 232 U. S. 261; *Knowlton* v. *Moore,* 178 U. S. 41.

We concede that differences of state law which may bring a person within or without the category designated by Congress as taxable, may not be read into a revenue act to spell out a lack of uniformity *(Poe* v. *Seaborn,* 282 U. S. 101), but we contend that the act itself may not create the lack of uniformity and comply [illegible] the constitutional provision.

In *United States* v. *Singer,* 15 Wall. 111, an attack for alleged non-uniformity was made upon the Act of July 20, 1868, imposing excises on distilled spirits, the distiller being assessed 80% of the producing capacity of his distillery, and if the spirits actually produced by him exceeded this 80% he was required to pay an excise upon the excess. The distiller in the *Singer* case had actually produced less than 80% of his capacity and objected to the assessment of 80%

for that reason. On the question of uniformity, this court said:

> "The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

Section 701 fixes one tax for one liquor dealer while Section 205 fixes a different tax for another liquor dealer.

In *Florida* v. *Mellon*, 273 U. S. 12, an attack was made on the inheritance tax act of 1926 for non-uniformity because the State of Florida did not impose inheritance taxes while other states did, the Act of Congress providing for credit on federal tax of sums paid on state inheritance taxes. The court said:

> "The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. 1, Sec. 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

Section 701 cannot be sustained on the ground that it operates uniformity in all states where the subject of the

tax—the business of a retail liquor dealer—is prohibited by state law. The non-uniformity, which the law itself by its very terms sets up, exists even in those states where by statute the subject of the tax is not prohibited. We find that a municipal ordinance, prohibiting the business of a liquor dealer under local option, creates a liability to pay $1,000.00 per annum instead of $25.00 per annum, notwithstanding the state in which the municipality is located does not by statute prohibit same.

Counsel for petitioner rely upon *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, but we find therein the following:

> "So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all states—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. * * *"

As heretofore stated, we submit that the act itself, by its wording, sets up the absence of uniformity, which is prohibited by the Constitution.

Conclusion.

For the reasons stated, we respectfully submit that Section 701 of the Revenue Act of 1926 fell with the repeal of the Eighteenth Amendment because it imposes a penalty and not an excise tax; and that, in any event, the same violates the provision of the Constitution referred to because of the absence of uniformity in its terms.

The judgment of the Circuit Court of Appeals shou
therefore be affirmed.

FRANK HICKMAN,
Attorney for Respondent

IRVINE E. UNGERMAN,
Of Counsel.

hould

s,

lents.

SUPREME COURT OF THE UNITED STATES.

No. 46.—October Term, 1935.

The United States of America, Petitioner, *vs.* Roger Kesterson and Bernord Roberts.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[December 9, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

This case, like No. 40, involves the validity of section 701 of the Revenue Act of 1926. The Circuit Court of Appeals reversed judgments of conviction under an indictment charging engaging in the business of a retail liquor dealer contrary to the laws of Oklahoma on August 17, 1934. (8 F. Supp. 680; 76 F. (2d) 913.)

For the reasons given in the opinion in No. 40 the judgment is

Affirmed.

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissent for the reasons stated in Mr. Justice Cardozo's opinion in No. 40.

A true copy.

Test:

Clerk, Supreme Court, U. S.